

No. 21,898

In The
UNITED STATES COURT OF APPEALS
For the Ninth Circuit

WILLIAM S. BENNETT,)
)
 Appellant,)
)
 -vs-)
)
 FEDERAL DEPOSIT INSURANCE)
 CORPORATION, as Receiver)
 of SAN FRANCISCO NATIONAL)
 BANK,)
)
 Appellee.)
 _____)

FILED

OCT 31 1967

WM. S. LUCK, CLERK

APPELLANT'S OPENING BRIEF

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Attorney for Appellant

This appeal has been taken from an order of the United States District Court for the Northern District of California, Southern Division thereof, denying a motion for relief from a (summary) judgment pursuant to Federal Rules of Civil Procedure 60(b) as entered on January 6, 1967.

THE NATURE OF THE CASE

The FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for SAN FRANCISCO NATIONAL BANK obtained a summary judgment against the present appellant, WILLIAM S. BENNETT, having alleged in a complaint that he was liable upon a "Continuing Guaranty" for money advanced to others. A summary judgment was rendered against WILLIAM S. BENNETT for \$405,430.00 with interest, upon a declaration that, inter alia, "the records of SAN FRANCISCO NATIONAL BANK showed that" WILLIAM S. BENNETT executed and delivered his Continuing Guaranty upon the obligations in question. The existence of the obligation was denied by BENNETT and the granting of the motion for summary judgment by the court took place at a time when the present appellant, believing himself to be in the course of negotiation with FEDERAL DEPOSIT INSURANCE CORPORATION upon numerous controversies, took no action in respect of such pending motion.

THE FACTS

The plaintiff's complaint charged that the appellant BENNETT was liable as a continuing guarantor for monies advanced, primarily to one E. T. KOMSTHOEFT. The case was one of a number of similar cases filed by the same plaintiff against BENNETT, in which the plaintiff had obtained continuances for the filing of pleadings, etc. because of negotiations in which BENNETT had offered to attempt to make available to the plaintiff the discovery of assets of various debtors. These negotiations were based upon correspondence which followed numerous conferences with counsel representing the plaintiff.

The first of such letters, the contents of which are self-explanatory, was written August 23, 1966, and reads as follows:

Thomas B. Swartz, Esquire
Bronson, Bronson & McKinnon
Attorneys at Law
255 California Street
San Francisco, California

Dear Mr. Swartz:

I am sending you this letter in duplicate so that a copy may be transmitted to Federal Deposit Insurance Corporation for review in respect of its contents; it is in furtherance of the matters discussed at a conference of August 11, 1966, in which you, I, and William S. Bennett were the participants.

Mr. Bennett strongly believes that he can be of substantial assistance to FDIC in its collection of monies from debtors out of assets not known to your principal, but discoverable by him. At the same time, since FDIC has made so many claims, followed by law suits, etc., against Bennett, he would hope to gain

some advantage both as to time and to potential amount in exchange for the benefit which he might thus bring to FDIC.

While we had discussed various formulae out of which these thoughts could be crystallized, you had proposed that a letter would offer a better vehicle for evaluation between you and the representative of FDIC.

Therefore, on behalf of William S. Bennett, I propose the following:

1. William S. Bennett will render active and diligent assistance to FDIC in the matter of collecting debts against borrowers of SFNB whose assets are known or discoverable by him, particularly those borrowers as to whom Bennett had originally received security.

2. Bennett would expect to receive, against asserted obligations of FDIC against him, some pro-rata credit out of any collection of money or assets which FDIC makes as a result of his efforts, or of information furnished by him; it had been suggested that for every dollar FDIC collects (either in money or assets), under such circumstances, half of such amount would be credited as an allowance against FDIC's claims against Bennett with this further proviso: Bennett would have the right to allocate such credit against a particular claim or claims of his own choosing, since there is a divergence of opinion as to the extent of Bennett's liability to FDIC.

3. In the meantime, a moratorium would be in substantial effect as between FDIC and Bennett; FDIC would not press any existing claims to trial against him and would defer or otherwise drop from any court calendar any pending motions for summary judgment, or the equivalent, involving Bennett and would not require, until receipt of further notification, the filing of any further pleadings in any of the pending actions. Similarly, Bennett would grant to FDIC an extension of the statute of limitations in relation to any claim now in the possession of FDIC against him but not as yet documented by the filing of a lawsuit with the same force and effect as though the applicable statute of limitations would thus relate to the

date of this writing.

Hoping that your views are in accord with the foregoing,
believe me to be,

Yours very truly,

JAMES MARTIN MacINNIS

APPROVED:

WILLIAM S. BENNETT

Following the same, the counsel for BENNETT wrote a
letter dated September 21, 1966, reading as follows:

Thomas B. Swartz, Esquire
Bronson, Bronson & McKinnon
Attorneys at Law
255 California Street
San Francisco, California

Dear Tom:

I have received other motions for summary judgments with copies of proposed orders from other members of your office in matters involving William S. Bennett. The number of files, claims and motions stemming from these matters is so overwhelming that I cannot segregate one from the other without a considerable expenditure of time and effort.

I hope that, while your client, FDIC, is considering the proposal I forwarded you recently regarding a moratorium, no adverse action respecting Mr. Bennett will be finalized.

I continue to be hopeful that Bennett's cooperation will be of sufficient practical value to permit realization of our plan.

Thanking you again for your courtesy, believe me to be,

Yours very truly,

JAMES MARTIN MacINNIS

On October 5, 1966, the counsel for plaintiff wrote the following letter:

James Martin MacInnis, Esq.
901 California Street, Suite 202
San Francisco, California 94108

Dear Jim:

Re: William S. Bennett (26-1)

I have forwarded to and discussed with the FDIC, the proposal which you and William S. Bennett have made for a moratorium with respect to litigation and other collection matters in return for certain services to be rendered by Mr. Bennett. I have been instructed by the FDIC to advise you that such a proposal is not acceptable to it and that they are continuing to pursue such collection remedies as it deems necessary to effect a maximum recovery for the Receivership, including those against Mr. Bennett.

While I appreciate your problem and the apparent good intentions of Mr. Bennett, I am nevertheless bound by the FDIC.

You may be assured, however, that we will not take the default of Mr. Bennett in any proceeding without first having given him notice and adequate time to respond. We will continue to route all these through your office until instructed otherwise.

Yours very truly,

THOMAS B. SWARTZ

In the meantime, and prior to October 5, 1966, the

plaintiff had been ordered by the court below, the late HONORABLE WILLIAM C. MATHES presiding, to prosecute motions for summary judgment in a great number of cases of similar import, all of which were pending before the same judge, for the purpose of expediting the multiplicity of lawsuits then existing.

In other cases involving similar subject matters, BENNETT had maintained that a number of alleged Continuing Guaranties bearing his signature were, in fact, spurious, and were documents relating to other obligations which had been improperly supplemented by material relating to specific substantial loans outside the knowledge of BENNETT; in a criminal action in the court below entitled UNITED STATES OF AMERICA v. SILVERTHORNE and BENNETT, No. 40467 therein, BENNETT successfully, in relation to numerous counts of the Indictment, established this contention as being the fact; of a sheaf of so-called "Continuing Guaranties", bearing BENNETT's signature, all but a solitary few contain material inserted by SILVERTHORNE without BENNETT's knowledge or consent.

Additionally, and more importantly, there had been introduced into evidence in the same criminal case a document executed by a Vice-President of the now defunct SAN FRANCISCO NATIONAL BANK, purporting to release BENNETT from all of such obligations. This document reads as follows:

Jan. 7, 1965

Mr. Art Atherton
San Francisco National Bank
260 California Street
San Francisco, California

Dear Mr. Atherton:

As per your request, I am enclosing herewith, the original Title Policy in the amount of \$170,000.00 insuring the undersigned on the Novak, McNutt transaction in Marin County, five various letters of correspondence between the title companies and the undersigned, in reference to the Novak deals, and six original recorded trust deeds in favor of the undersigned, signed by Novak, with an assignment of each of the trust deeds from the undersigned to the San Francisco National Bank.

You further requested that I assign over to the San Francisco National Bank the \$550,000.00 Trust Deed which Mr. McNutt caused to be recorded in favor of the undersigned. This assignment is enclosed herewith also, with the understanding that upon assigning the trust deeds over to San Francisco National Bank and turning over of my files and records to the bank, the undersigned William S. Bennett is to be relieved of any and all liability, past or future, in connection with these loans or any of the loans where security was taken and assigned to the bank.

You also requested assignments on the Claitor properties, but since I previously turned over my files to the bank on the Claitor loans, I am unable to prepare the assignments; however I will sign the assignments if you have them prepared and I will assign them to the bank based on the same agreement as the above stated.

Thank you. Please sign acknowledgment and receipt of this letter and documents.

Sincerely,

WILLIAM S. BENNETT

s/ ARTHUR ATHERTON
SAN FRANCISCO NATIONAL BANK
1-7-65
DATE

Copies of the document last above mentioned have been filed (over objection) as separate defenses in the court below in numerous of the other cases upon alleged Continuing Guaranties which have not yet been brought to trial.

BENNETT possessed a sufficient defense to the plaintiff's complaint had he been allowed to present it.

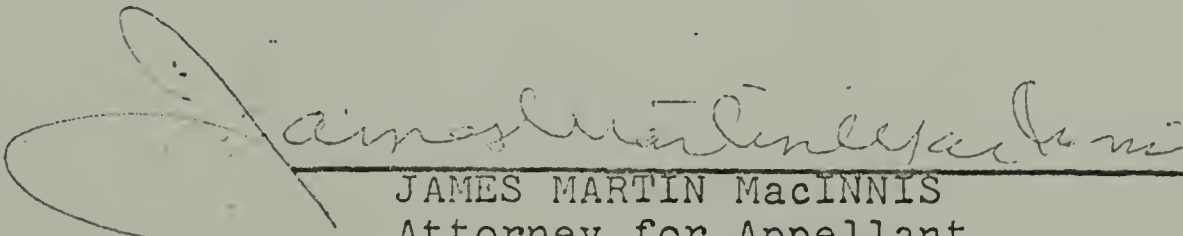
It is respectfully prayed that the circumstances shown by the correspondence alone (all of which were filed with the court below), when added to the fact of the enormity of the existing judgment, should have impelled the court below to grant BENNETT the relief sought.

To saddle him with an obligation so well in excess of \$400,000.00 would thus seem to fit the cliché of an "abuse of discretion".

It is hence respectfully requested that the summary judgment of the court below be set aside and that the appellant be permitted to present his defense upon a trial.

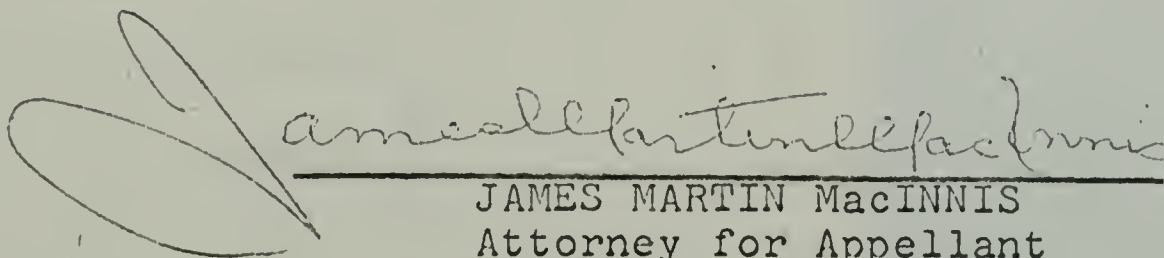
DATED: October 27, 1967.

Respectfully submitted,


JAMES MARTIN MacINNIS
Attorney for Appellant

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


JAMES MARTIN MacINNIS
Attorney for Appellant

